Seventh Circuit Review

Volume 8 | Issue 1 Article 6

9-1-2012

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SEVENTH CIRCUIT REVIEW Volume 8, Issue 1 Fall 2012

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Cite as: Abby Bochenek, *The Cat's Revenge: Individual Liability Under the Cat's Paw Doctrine*, 8 SEVENTH CIRCUIT REV. 120 (2012), *at* http://www.kentlaw.iit.edu /Documents/Academic Programs/7CR/v8-1/bochenek.pdf.

INTRODUCTION

Judge Posner may have coined the phrase "cat's paw" in the 1991 Seventh Circuit case *Shager v. Upjohn Company*,[1] but the phrase has a much deeper history. It originated as an Aesop fable[2] and later transformed into a 1600s fable by Jean de La Fontaine, titled "The Monkey and the Cat."[3] In the fable, the monkey yearns for chestnuts roasting over an open flame; not wanting to burn himself, he convinces a cat to reach into the fire and retrieve the piping hot chestnuts.[4] The unfortunate cat relentlessly scoops the chestnuts from the fire, only to find that upon completion, the monkey has devoured the chestnuts in their entirety; the monkey left the cat without a reward for his work.[5]

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[1] Shager v. Upjohn Company, 913 F.2d 398, 405 (7th Cir. 1990).

[2] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1190 n.1 (2011).

[3] Julie M. Covel, Comment, *The Supreme Court Writes A Fractured Fable of the Cat's Paw Theory in* Staub v. Proctor Hospital [Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011)], 51 WASHBURN L.J. 159, 159 n.2 (2011).

[4] *Id*. at 160.

[5] *Id*.

This fable continues its transformation, as now its story serves as an analogy to a type of liability in employment discrimination cases. Specifically, a "cat's paw" situation occurs when (1) a final decision-maker relies on a subordinate's recommendation; (2) that recommendation is motivated by discriminatory animus; and (3) the final decision-maker uses the biased recommendation to take an adverse employment action against another employee.[6] The final decision-maker, or the person within the company with the authority to implement an adverse employment action, symbolizes the cat, while the employee whispering his or her biased remarks in the decision-maker's ear represents the monkey.[7]

In 2011, the Supreme Court endorsed employer liability under "cat's paw,"[8] and in the process established a new approach to answering the question of when an employer can be "held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision."[9] The Court evaluated "cat's paw" in the context of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"),[10] but the Court ensured lower courts would broadly interpret its holding by noting how similar USERRA is to Title VII of the Civil Rights Act of 1964 ("Title VII").[11] Applying "cat's

[6] Smith v. Bray, 681 F.3d 888, 897 (2012).

[7] Covel, *supra* note 3, at 159-160.

[8] *Staub*, 131 S. Ct. at 1193 (finding that the employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision).

[9] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1187 (2011).

[10] 38 U.S.C. § 4311(a) (1996) ("A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."); *Id*. at § 4311(c) (stating when an employer is considered to have engaged in actions prohibited by the statute). *See infra* notes 54, 118.

[11] 42 U.S.C. § 2000e-2(a) (1991) (stating when an employer's employment practice is illegal); *Id*. at § 2000e-2(m) (stating that "an unlawful employment

paw" to the facts, the Court found that the nondecision-making employees were motivated by hostility towards the plaintiff's military obligations, and that their actions served as causal factors behind the decision-maker's choice to terminate the plaintiff.[12]

Staub offered the Court an opportunity to clear up the confusion surrounding the circuit courts' differing approaches to subordinate bias;[13] however, the Court chose instead to create a new framework.[14] The Court held that that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[15] This holding laid out for the circuit courts a test under which to evaluate a "cat's paw" liability claim. This test focused on two elements: (1) whether a supervisor's act motivated by a discriminatory animus is intended by that supervisor to cause an adverse employment action, and (2) whether that act is a proximate cause of the ultimate employment action.[16]

Along with Title VII and the USERRA, courts apply "cat's paw" liability to other statutes including § 1981[17] and § 1983.[18] In particular, "at least five circuits have indicated that a cat's paw theory would support imposing *individual* liability under § 1983 on subordinate governmental employees with unlawful motives who cause the real decision-makers to retaliate."[19] The Seventh Circuit recently expanded individual liability to § 1981 claims in *Smith v. Bray,*[20] focusing on

practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[12] *Staub*, 131 S. Ct. at 1194.

[13] *See* discussion *infra* Part I.B.

[14] Covel, *supra* note 3, at 160.

[15] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011) (emphasis in original).

[16] *Id*.

[17] 42 U.S.C. § 1981 (1991).

[18] 42 U.S.C. § 1983 (1996).

[19] Smith v. Bray, 681 F.3d 888, 898 (7th Cir. 2012) (emphasis in original).

[20] *Id*.

liability of the non-decision-maker and whether his or her actions "were a 'causal factor,' based on common-law proximate cause principles, in [another employee's] termination decision."[21]The court found that individual liability is appropriate in § 1981 cases when a "subordinate with a retaliatory motive… caus[es] the employer to retaliate against another employee."[22]

The issue this Note addresses is whether it is proper to hold an individual liable in a § 1981 suit. This Note will argue that the Seventh Circuit is correct in its decision to create liability for an individual employee under § 1981.[23] Part I of the Note reviews the origin and history of the "cat's paw" legal doctrine prior to the *Smith* decision. Part II analyzes the Seventh Circuit's *Smith* decision and its formula for expanding "cat's paw" to include holding individual employees liable to a plaintiff. Part III argues (1) why this expansion is proper; (2) what potential implications the *Smith* individual liability rule will have on the law, on employment lawsuits and on corporations; and (3) a criticism of the Seventh Circuit's decision.

I. HISTORY OF THE "CAT'S PAW" DOCTRINE

Before its expansion to individual liability under § 1981,[24] the "cat's paw" liability doctrine had a tumultuous history. First coined by Judge Posner in 1990,[25] the circuits took three distinct views[26] on when a corporation is liable under the doctrine before the Supreme Court examined "cat's paw."[27] Overturning a Seventh Circuit decision, the Supreme Court laid out its own test to determine when an employer is liable under the "cat's paw" doctrine.[28] This section

[21] *Id*. at 900.
[22] *Id*. at 899.
[23] *Id*.
[24] *Id*.
[25] *See infra* Part I.A.
[26] *See infra* Part I.B.
[27] Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011).
[28] *See infra* text accompanying notes 55-58.

explores the doctrine's history until the Seventh Circuit's *Smith* decision.

A. The Doctrine is Born

In *Shager v. Upjohn Company*, Judge Posner first compared the "cat's paw" fable to an employment law situation, a situation in which a biased subordinate influences a decision-maker's choice to take an adverse employment action against another employee.[29] In that case, plaintiff Shager appealed the dismissal of his suit under the Age Discrimination in Employment Act ("ADEA")[30] against his employer, Asgrow Seed Company ("Asgrow"), and codefendant Upjohn Company.[31] Asgrow terminated Shager, who was over fifty years old, in favor of keeping a twenty-nine year old employee, Schradle, despite Shager out-performing Schradle in a more difficult territory.[32] The Seventh Circuit considered whether the bias of Shager's supervisor, Lehnst, against older workers could be imputed to Asgrow.[33] The court noted that Lehnst did not fire Shager; rather, Asgrow's Career Path Committee did.[34] Shager alleged that Lehnst set him up for failure by assigning him a difficult territory to succeed in and by explaining Shager's performance to the Career Path Committee in an unfavorable light.[35] Posner stated that if the Career Path Committee "acted as the conduit of Lehnst's prejudice- his cat's-paw- the innocence of its members would not spare the company from liability."[36] The phrase

[29] Shager v. Upjohn Company, 913 F.2d 398, 405 (7th Cir. 1990) ("If [the Career Path Committee] acted as the conduit of Lehnst's prejudice-his cat's-paw-the innocence of its members would not spare the company from liability.").

[30] 29 U.S.C. §§ 621- 634 (1996).

[31] *Shager*, 913 F.2d at 399.

[32] *Id*.

[33] *Id*. at 404.

[34] *Id*. at 405.

[35] Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

[36] *Id*.

"cat's paw" caught on, and currently every appellate court as well as the Supreme Court acknowledges some form of "cat's paw" liability.[37]

B. Inconsistent Treatment Among Districts

Before *Staub*, the circuit courts' "cat's paw" liability tests varied drastically. The circuits differed primarily on the following: (1) the burden of causation that a plaintiff had to meet to attach liability to an employer; (2) approaches on agency in relation to "cat's paw" liability; and (3) the impact of and standard for an employer's independent investigation.[38] These differing approaches created confusion as to when employers were liable for subordinate employee's influence on a decision-maker to take an adverse employment action against another employee.

The various standards employed by circuit courts before *Staub* fell into three categories based on the difficulty level a plaintiff faced in bringing a motion for summary judgment: lenient, strict, and intermediate.[39] The most commonly applied standard was the lenient standard, under which an employer was liable when a biased subordinate influenced an adverse action by the ultimate decision-maker.[40] First, in the 1990's, the Seventh Circuit applied the lenient standard, finding that, in order to overcome a motion for summary judgment, a plaintiff only needed to show that "an employee with discriminatory animus provided factual information or other input that

[37] Stephen F. Befort & Alison L. Olig, *Within in Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. Rev. 383, 385-386 (2008).

[38] Covel, *supra* note 3, at 167-68.

[39] Befort & Olig, *supra* note 37, at 386.

[40] *Id*. *See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990); Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000); Griffin v. Wash. Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 877 (6th Cir. 2001); Rose v. N.Y. City Bd. of Educ., 257 F.3d 156, 163 (2d Cir. 2001); Bergene v. Salt River Project Agric. Improvement and Power Dist., 272 F.3d 1136, 1141 (9th Cir. 2001); EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920, 924 (8th Cir. 2002).

may have affected the adverse employment action."[41] While there was some variety between the circuits that applied this approach, one continuing theme emerged: any influence caused by subordinate bias established a causal link to an employer's liability.[42] Therefore, under the lenient standard a plaintiff did not have to cross a high hurdle to get past a defendant's summary judgment motion.

On the other end of the spectrum, the Fourth Circuit applied the strict standard. This standard relied on two requirements. First, the strict standard looked more so on agency principles, so that an employer was liable for actions of subordinates with supervisory authority.[43] Second, the strict standard required "but-for" causation.[44] In *Hill v. Lockheed Martin Logistics Management Incorporated*, the court emphasized the circuit's choice to take a lone approach and "focus upon the language of the discrimination statutes and Supreme Court precedents."[45] The court found that an employer is "liable not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision," which encompassed actual decision-makers for the employer.[46]

Lastly, two circuits introduced intermediate approaches after *Hill*. The Tenth Circuit decided that the key issue in the "cat's paw" debate between the circuits was "whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the

[41] Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1459 (7th Cir. 1994). *See also* Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001) (Finding that "cat's paw" liability results when "those exhibiting discriminatory animus influenced or participated in the decision to terminate.").

[42] Befort & Olig, *supra* note 37, at 392. *See also* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998) ("[T]he harasser *is* the decisionmaker, and the titular 'decisionmaker' is a mere conduit for the harasser's discriminatory animus.") (emphasis in original).

[43] Befort & Olig, *supra* note 37, at 395.

[44] *Id*.

[45] Hill v. Lockheed Martin Logistics Mgmt. Inc., 354 F.3d 277, 290 (4th Cir. 2004).

[46] *Id*. at 291.

adverse employment action"[47] and that to find liability, there had to be a causal connection.[48] The Seventh Circuit transitioned from its previously lenient approach and attempted to clarify its position on "cat's paw" liability. On one hand, the court found that a plaintiff must establish that the subordinate employee had enough influence to function as a decision-maker;[49] on the other hand, the court allowed an employer to avert liability despite this influence being present if the employer conducted an independent investigation into the plaintiff's claims.[50] This new, intermediate approach is reflected in the Seventh Circuit's *Staub* decision.

C. 7th Circuit: Staub v. Proctor Hospital

In 2009, the Seventh Circuit solidified its acceptance of the intermediate "cat's paw" liability standard in its *Staub v. Proctor Hospital* decision.[51] The court established the rule that "where a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker."[52] Thus, the Seventh Circuit employed the singular influence test, stating that "cat's paw" required "blind reliance, the stuff of 'singular influence.'"[53]

[47] EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 488 (10th Cir. 2006) (citing English v. Colo. Dep't of Corr., 248 F.3d 1002, 1011(10th Cir. 2001)), *cert. dismissed*, 127 S. Ct. 1931 (2007).

[48] *Id.*

[49] Brewer v. Bd. of Trustees of the Univ. of Ill., 479 F.3d 908, 917 (7th Cir. 2007).

[50] *Id*. at 920.

[51] Staub v. Proctor Hosp., 560 F.3d 647, 656 (7th Cir. 2009) *rev'd and remanded*, 131 S. Ct. 1186 (2011).

[52] *Id*. (quoting *Brewer*, 479 F.3d at 918).

[53] *Id*. at 659.

D. The Supreme Court's Rejection of the Seventh Circuit's Decision

In 2007, the Supreme Court passed on an opportunity to clarify the "cat's paw" doctrine, endorsing instead a general concept of "cat's paw" liability instead of discussing the range of circumstances for employer liability.[54] However, the Court revisited the doctrine when it overruled the Seventh Circuit in 2011.[55] The Court defined "cat's paw" as applying when a "company official who makes the decision to take an adverse employment action . . . has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else."[56] Under the Court's formula, a finding of "cat's paw" liability requires that the biased supervisor intend an adverse employment action to occur[57] and that this supervisor's action be "a causal factor" of the adverse employment action.[58] While the plaintiff in *Staub* sued the defendants under USERRA, the Court noted that the statute is "very similar to Title VII."[59]

The Court declined to adopt the Seventh Circuit's rule that an independent investigation into the allegations of discriminatory bias is enough to negate the prior discrimination's effect.[60] If the investigation utilized facts provided by the biased supervisor, the Court reasoned, then the employer essentially allowed that supervisor to participate in and taint the investigation.[61] Regardless of an independent investigation, the employer is liable to the plaintiff because the

[54] Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

[55] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011).

[56] *Id*. at 1191.

[57] *Id*. at 1191-1192.

[58] *Id*. at 1192-1193. The Court added a footnote after its holding, stating that "the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles." *Id*. at 1194 n.4.

[59] *Id*. at 1191.

[60] *Id*. at 1193.

[61] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011).

decision-maker and the biased supervisor are its agents[62] acting within the scope of their employment.[63]

Although the Court laid down a test for the circuits, it left two areas open for interpretation. The Court chose not to address whether an employer is liable if a co-worker influences the decision-maker to make an adverse employment decision.[64] Further, the Court made no findings regarding whether an employer would have an affirmative defense to a "cat's paw" action if the plaintiff failed to take advantage of the employer's grievance process.[65] While the Court finally acknowledged that the "cat's paw" doctrine exists as good law, areas still remained open for the circuits to creatively interpret at their leisure.

II. *SMITH V. BRAY*

On an issue of first impression, the Seventh Circuit sought to answer "whether the subordinate with a retaliatory motive may be individually liable under § 1981 for causing the employer to retaliate against another employee."[66] The case came to the Seventh Circuit on an appeal from the Northern District of Illinois, Eastern Division.[67] The District Court granted summary judgment in favor of both defendants,[68] and the plaintiff, Darrell Smith ("Smith"),[69] appealed. The claim at issue was Smith's § 1981 retaliation claim.[70] When Smith's suit reached the Seventh Circuit on appeal, only one individual, Denise Bray ("Bray"), remained a defendant.[71] This section

[62] *Id*.
[63] *Id*. at 1194 n.4.
[64] *Id*.
[65] *Id*.
[66] Smith v. Bray, 681 F.3d 888, 899 (7th Cir. 2012).
[67] *See infra* text accompanying note 72.
[68] *See infra* text accompanying note 118.
[69] *See infra* text accompanying note 72.
[70] *See infra* text accompanying notes 74-75.
[71] *See infra* text accompanying note 120.

discusses the history and facts of the case, as well as the Seventh Circuit's analysis of individual liability under the "cat's paw" doctrine.

A. Origination of Smith v. Bray*: District Court*

1. Procedural History

Plaintiff Smith filed his complaint in the Northern District of Illinois, Eastern Division, on June 15, 2009.[72] He filed his complaint against companies Lydondell Chemical Company ("Lyondell") and Equistar Chemicals, LP ("Equistar"), and against individuals James Bianchetta ("Bianchetta") and Bray.[73] Count I of Smith's complaint asserted a claim for racial discrimination against Bianchetta pursuant to § 1981.[74] In Count II, he asserted § 1981 claim for retaliation against both Bianchetta and Bray.[75] Smith was later forced to dismiss his complaint against Lyondell and Equistar because the companies filed for bankruptcy, and his complaint violated the Bankruptcy Code's automatic stay.[76] The case then came before the United States District Court on Bianchetta's and Bray's individual motions for summary judgment.[77]

2. Facts

Smith is African-American.[78] He worked as a Process Technician for Equistar from November 6, 2000,[79] until Equistar terminated his

[72] Smith v. Bianchetta, 803 F. Supp. 2d 877, 880 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).
[73] *Id*.
[74] *Id*. at 887.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] Smith v. Bianchetta, 803 F. Supp. 2d 877, 881 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).
[79] *Id*.

employment on August 4, 2006.[80] Bianchetta acted as Smith's supervisor, and Bray was a Human Resources manager.[81] The controversy began when, under doctor's orders, Smith stayed home from work because of stress.[82] He applied for short-term disability to cover this time.[83] Concentra, a third party firm where Smith filed his disability request, attempted to speak with Smith's doctor regarding his application, but did not receive sufficient information.[84] Therefore, Concentra could not issue a recommendation on Smith's claim.[85] Smith's doctor recommended he take another thirty days off from work, and ultimately, Concentra denied Smith's short-term disability application.[86]

Because of Concentra's denial, Richard Purgason ("Purgason"), a Plant Manager, considered Smith's absence to be without leave and requested Smith's termination.[87] Bray signed a letter to Smith, dated August 4, 2006, effectively terminating his employment for job abandonment in violation of an Equistar policy.[88]

Smith argued that he missed work because he experienced stress as a result of continuous racial discrimination from Equistar employees.[89] For example, Smith was assigned extra duties;[90] told he was not doing his job;[91] complained about via an anonymous hotline

[80] *Id*. at 882.
[81] *Id*. at 881.
[82] *Id*.
[83] *Id*.
[84] Smith v. Bianchetta, 803 F. Supp. 2d 877, 881 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).
[85] *Id*.
[86] *Id*. at 882.
[87] *Id*.
[88] *Id*.
[89] *Id*. at 883.
[90] Smith v. Bianchetta, 803 F. Supp. 2d 877, 883 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).
[91] *Id*.

for using incorrect materials;[92] and involved in a verbal altercation regarding his responsiveness to an alarm.[93] Moreover, someone left a note on his desk saying he did very little work.[94] Controversy also surrounded a special project Smith began, and later stopped, working on.[95] When Bianchetta requested Smith's work on this project, he found that items were deleted and issued Smith a warning for removing this information.[96] Smith stated coworkers erased the work.[97]

Along with alleging that the above incidents occurred because of his race, Smith asserted that Bianchetta harassed him and made racist remarks about him, both of which escalated with time.[98] For instance, when Smith complained about not receiving the highest pay possible, Bianchetta allegedly "told him it was because black people are not smart enough for a promotion."[99] According to coworkers' testimonies, Bianchetta stated that he "got [Smith]" around the time that Smith was terminated.[100] Further, when Smith retained a lawyer, Bianchetta said that "it was the worst thing [Smith] could have done, that he was going to tell Bray about it, and that Smith would be sorry."[101]

Smith complained to Equistar about Bianchetta.[102] Bray was aware of Smith's numerous complaints, and she investigated them; however, she did not speak with the corporate Human Resources

[92] *Id*.

[93] *Id*. at 882.

[94] *Id*.

[95] *Id*. at 884.

[96] Smith v. Bianchetta, 803 F. Supp. 2d 877, 884 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).

[97] *Id*.

[98] *Id*. at 884-885.

[99] *Id*. at 884.

[100] *Id*. at 885.

[101] *Id*.

[102] Smith v. Bianchetta, 803 F. Supp. 2d 877, 885 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).

Department as company policy mandated.[103] Bray stated she was not involved in deciding Smith's discipline,[104] and that her role did not allow her to make termination decisions.[105] However, Bray wrote a first-person report requesting Smith's termination and Pergason testified that Human Resources managers were involved to some degree in termination decisions.[106] Bray stated her involvement was limited to pulling together the termination request.[107]

3. District Court Analysis

The District Court ultimately determined that Smith met his burden on his retaliation claim to overcome summary judgment against Bianchetta.[108] Count I of Smith's complaint alleged racial discrimination pursuant to § 1981 against Bianchetta,[109] and the court allowed the case to continue because it found direct evidence to support Smith's claim when viewing the factual disputes in his favor.[110] Smith's hostile-environment claim was also allowed to move forward because whether it was brought within the statute of limitations was a jury question.[111] Smith's retaliation claim against Bianchetta in Count II moved forward as well.[112]

In addition to his claims against Bianchetta, Smith brought a retaliation claim against Bray, alleging that Bray terminated him for complaining about both discrimination and a hostile work

[103] *Id*.
[104] *Id*.
[105] *Id*. at 886.
[106] *Id*.
[107] *Id*.
[108] Smith v. Bianchetta, 803 F. Supp. 2d 877, 890 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).
[109] *Id*. at 888.
[110] *Id*. at 889.
[111] *Id*.
[112] *Id*. at 890.

environment.[113] However, this claim ultimately failed because the court excluded from evidence a statement made by Bianchetta that he and Bray wanted to fire Smith as soon as he took sick leave.[114] Smith also argued Bray participated in decisions to terminate him.[115] However, insufficient evidence existed to show a factual dispute, and Smith failed to prove Bray *caused* his termination *because* of his complaints.[116] Further, the District Court found that Smith's claim failed under the indirect method of proof because he did not find another similarly situated individual who was treated more favorably.[117] Therefore, the District Court granted Bray's summary judgment motion. [118]

B. Smith v. Bray *is appealed to the Seventh Circuit*

1. Seventh Circuit Opinion

Plaintiff Smith appealed the District Court's holding that granted Bray's summary judgment motion.[119] Due to a prior settlement with Bianchetta, Bray appeared as the only defendant before the Seventh Circuit.[120] The Seventh Circuit was thus confronted with a case where the plaintiff brought suit, not against an employer, but instead against two individuals.[121] The Seventh Circuit sought to define "what is needed to prove that a particular individual is legally responsible for the alleged discrimination and/or retaliation."[122] The court wanted to

[113] *Id*.

[114] Smith v. Bianchetta, 803 F. Supp. 2d 877, 890 (N.D. Ill. 2011), *aff'd sub nom.* Smith v. Bray, 681 F.3d 888 (7th Cir. 2012).

[115] *Id*. at 891.

[116] *Id*. (emphasis added).

[117] *Id*.

[118] *Id*. at 892.

[119] Smith v. Bray, 681 F.3d 888, 892 (7th Cir. 2012).

[120] *Id*.

[121] *Id*.

[122] *Id*.

know if Smith "presented sufficient evidence: (1) that Bray caused [Smith] to be fired; and if so, (2) that she acted with the motive to retaliate against him."[123]

The court began its analysis with a review of § 1981's past,[124] stating that "[t]he Supreme Court has held that § 1981 authorizes claims for retaliation, if one person takes action against another for asserting the right to substantive contractual equality provided by § 1981."[125] The court then laid out what evidence Smith needed to produce in order to avoid summary judgment under a direct method of proof.[126] Essentially, Smith needed to present direct evidence of "(1) his statutorily protected activity; (2) a materially adverse action taken by Bray; and (3) a causal connection between the two."[127]

Smith satisfied the first element by demonstrating that he complained about discrimination.[128] Moving to the second element, because Smith sued Bray in her individual capacity, the court examined Bray's participation in Smith's termination.[129] Here, the court delved into the "cat's paw" doctrine.[130] The court began exploring the doctrine by reiterating the Supreme Court's comparison in *Staub*, that even though the Court endorsed "cat's paw" employer liability under USERRA, circuits have also assumed that the theory supports holding an employer liable under § 1981 and § 1983.[131]

The court then introduced the concept of individual liability, using § 1983 as an example of how individual liability can fall under the

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[123] *Id*.

[124] 42 U.S.C. § 1981(1991). *See* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 383 (2004) (The 1991 Act "defin[ed] the key 'make and enforce contracts' language in § 1981 to include the 'termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'").

[125] Smith v. Bray, 681 F.3d 888, 896 (7th Cir. 2012).

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*. at 896-888.

[130] *Id*.

[131] 42 U.S.C. § 1983 (1996). Smith v. Bray, 681 F.3d 888, 897 (7th Cir. 2012). *See supra* text accompanying notes 10-11, 54.

"cat's paw" doctrine. Under this statute, "at least five circuits have indicated that a cat's paw theory would support imposing *individual* liability under § 1983."[132] After solidifying that individual liability is appropriate under § 1983, the court moved to its main issue. The issue addressed was an issue of first impression: "whether the subordinate with a retaliatory motive may be individually liable under § 1981 for causing the employer to retaliate against another employee."[133] The Seventh Circuit answered yes.[134]

The court succinctly explained why individual liability can flow from the "cat's paw" employer liability analysis. The Seventh Circuit reasoned that similar standards are used for § 1981, § 1983, and Title VII cases, so an individual should be held liable for conduct under § 1981 that an employer would be liable for under Title VII or § 1981.[135] Further, the court thought the concept of fairness supported holding the "malicious 'monkey'" responsible for his or her actions instead of making the "'hapless cat,'" the employer, solely liable.[136]

Applying its "cat's paw" theory to the facts in the case, the Seventh Circuit asked whether Bray "intentionally helped cause the adverse employment action against [Smith]" and "whether the non-decision-maker's actions were a 'casual factor,' based on common-law proximate cause principles, in the termination decision."[137] Smith produced sufficient evidence to overcome summary judgment on both factors, meeting the burden of showing that Bray participated in an adverse action against him for purposes of § 1981.[138]

Despite overcoming the "cat's paw" hurdle to hold Bray liable in her individual capacity, the Seventh Circuit ultimately agreed with the

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[132] *Smith*, 681 F.3d at 898 (emphasis in original).

[133] *Id*. at 899.

[134] *Id*.

[135] *Id*.

[136] *Id*.

[137] Smith v. Bray, 681 F.3d 888, 899-900 (7th Cir. 2012).

[138] *Id*. at 900. Bray was involved at every level of Smith's workplace controversies and a reasonable juror could believe that the ultimate decision-maker, Purgason, relied on Bray's input when he decided to terminate Smith's employment.

District Court that Smith's claim failed.[139] Smith had to show that his complaints to Bray about Bianchetta were a "substantial or motivating factor" in Bray's decision to recommend that Perguson terminate Smith.[140] Smith could not adequately support this element with admissible evidence and therefore, his retaliation claim failed.[141]

Despite Smith's inability to prove this element, the court described, for future plaintiffs, what needs to be demonstrated to survive summary judgment. First, a plaintiff could show direct evidence, or "something akin to an admission,"[142] made by the subordinate employee about his or her retaliatory motive or animus.[143] Additionally, a plaintiff could show a "'convincing mosaic' of circumstantial evidence" of the subordinate employee's retaliatory animus that "would suggest to a reasonable juror that she tried to get him fired because he had complained about discrimination."[144] For example, had Smith offered evidence that Bray turned a blind eye to Smith's racial discrimination complaints, Smith would have satisfied the intent element.[145] Ultimately, the court held that Smith had "not offered sufficient admissible evidence to allow a reasonable jury to find that [Bray] was motivated by a desire to retaliate against him for his complaints of race discrimination."[146]

[139] *Id*. ("[W]e agree with the district court that there simply is not enough admissible evidence showing that Bray acted with a retaliatory motive, *i.e.*, that she caused Smith's termination *because* he had complained about discrimination.").

[140] *Id*. (quoting Culver v. Gorman & Co., 416 F.3d 540, 545 (7th Cir. 2005)).

[141] *Id*. at 901.

[142] *Id*. at 900.

[143] Smith v. Bray, 681 F.3d 888, 900-901 (7th Cir. 2012).

[144] *Id*.

[145] *Id*. at 906.

[146] *Id*. at 892.

2. Areas Left Open for Interpretation

Following in the Supreme Court's footsteps,[147] the Seventh Circuit did not address the issue of whether an employee would be held liable if a co-worker, not a supervisor, acted with discriminatory animus and caused an adverse employment action. However, there is evidence that the distinction between the two is of little significance. In March of 2012, Judge Posner stated:

> In employment discrimination law the "cat's paw" metaphor refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a *subordinate* who does have such a motive and intended to bring about the adverse employment action. So if for example the *subordinate* has told the supervisor that the employee in question is a thief, but as the *subordinate* well knows she is not, the fact that the supervisor has no reason to doubt the truthfulness of the accusation, and having no doubt fires her, does not exonerate the employer if the *subordinate's* motive was discriminatory.[148]

Judge Posner's use of the word "subordinate" as opposed to "supervisor" can be interpreted as a sign from the court that in fact, the employee can be a co-worker, and that holding a supervisory position is not a pre-requisite that a plaintiff must meet before he or she can pursue "cat's paw" liability.[149] While this example relates to employer

[147] The Seventh Circuit's failure to address this issue is similar to the Supreme Court's decision to not address whether an employer is liable if the employee harboring a discriminatory bias is a supervisor or a c-worker. *See supra* text accompanying note 64.

[148] Cook v. IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir. Mar. 8, 2012) (emphasis added).

[149] *See* Johnson v. Koppers, Inc., 10 C 3404, 2012 WL 1906448, at *7 (N.D. Ill. May 25, 2012).

liability, the Seventh Circuit in *Smith* used the word "subordinate" in its statement of the case's issue,[150] its conclusion,[151] and in two footnotes.[152] The court's decision to use "subordinate" rather than "supervisor" is indicative of the position that liability is not limited to supervisors.

III. THE SEVENTH CIRCUIT CORRECTLY EXPANDED "CAT'S PAW" LIABILITY

The Seventh Circuit correctly expanded "cat's paw" liability to hold not only an employer, but also an individual, liable in a § 1981 retaliation claim. Both § 1981's history[153] and similarity to § 1983,[154] along with a notion of fairness,[155] support the Seventh Circuit's conclusion. The impact of this conclusion will expand who a plaintiff can bring suit against in the future, however, how far that expansion will go depends on (1) whether the defendant must be a supervisor to be liable; and (2) whether a corporation's status as judgment-proof has any effect on whether an individual is liable.[156] Corporations will first feel the case's impact because their training programs will need to reflect the possibility of employee liability.[157]

[150] Smith v. Bray, 681 F.3d 888, 899 (7th Cir. 2012) ("This case presents a related but distinct question of first impression: whether the *subordinate* with a retaliatory motive may be individually liable under § 1981 for causing the employer to retaliate against another employee.") (emphasis added).

[151] *Id*. ("The cat's paw theory can support individual liability under § 1981 for a *subordinate* employee who intentionally causes a decision-maker to take adverse action against another employee in retaliation for statutorily protected activity.") (emphasis added).

[152] *Id*. at 897 n.3 (stating that "cat's paw" liability applies when a biased *subordinate* triggers an adverse employment action) (emphasis added); *Id.* at n. 5 (noting that the Eighth Circuit's cases support only holding biased *subordinates*, not innocent decision-makers, individually liable under § 1983) (emphasis added).

[153] *See infra* Part III.A.1.

[154] *See infra* Part III.A.2.

[155] *See infra* Part III.A.3.

[156] *See infra* Part III.B.

[157] *Id*.

Despite supporting the Seventh Circuit's decision, one criticism of the court's decision to expand "cat's paw" liability to individuals is that it expanded liability without clarifying the confusing areas remaining after *Staub*.[158]

A. A Synthesis of Prior Law Supports Expansion

Several reasons support expanding liability in a § 1981 retaliation claim to an individual. First, the statute applies to private parties and allows individuals to be held liable when a person causes a constitutional deprivation.[159] Section 1981 is similar to § 1983 in this way, as both statutes provide a party with a remedy against an individual when that individual deprives a party of a constitutional right.[160] Multiple circuits have in fact extended individual liability to "cat's paw" cases pursuant to § 1983.[161] Further, when a plaintiff cannot recover from an employer, as in *Smith*, fairness supports allowing that plaintiff to recover from an individual whose actions resulted in the plaintiff's adverse employment action.[162]

1. 42 U.S.C. § 1981's Background

Expanding liability to individuals is supported by statutory law as well as by the Seventh Circuit's prior interpretations. First, the history and purpose of § 1981 support extending liability to individuals in the employment context. Section 1981 gives all people the right to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property."[163] This statute is designed to protect against employment discrimination by private parties despite the statute not

[158] Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011). *See infra* Part III.C.
[159] *See infra* Part III.A.1.
[160] See *infra* Part III.A.2.
[161] *Id*.
[162] *See infra* Part III.A.3.
[163] 42 U.S.C. §1981(a) (1991).

specifically mentioning employment contracts.[164] Congress has never assigned a statute of limitations to Section 1981,[165] but § 1981 falls within the federal "catch-all" four-year statute of limitations period.[166]

Expansion is not new to §1981. In 1991, Congress amended the Civil Rights Act to include language to protect the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[167] This Amendment expanded the statute[168] and overturned a previous case that promoted a narrow construction of the statute.[169]

Further, this statute is intended to apply to private parties, including private citizens, and is not based on state action.[170] The

[164] *Id*. at §1981(c). *See* Waters v. Wis. Steel Works of Int'l Harvester Co., 427 F.2d 476, 483 (7th Cir. 1970) (stating that the provision of this section that all persons within United States shall have same right to make and enforce contracts as is enjoyed by white citizens was designed to prohibit private job discrimination, even though it does not expressly mention employment contracts).

[165] 29 A.L.R. Fed. 710 (1976) ("Congress has not specifically stated a limitation period for causes of action arising under 42 U.S.C.A. § 1981.").

[166] Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, (2004) ("[T]he 1991 Act fully qualifies as 'an Act of Congress enacted after [December 1, 1990]' within the meaning of § 1658."). *See also* Dandy v. United Parcel Serv., Inc., 388 F.3d 263, 269 (7th Cir. 2004) (The Supreme Court stated in *Jones* that a hostile work environment, wrongful termination, and failure-to-transfer claims under § 1981 were governed by § 1658 because these claims were enacted by the 1991 Civil Rights Act.).

[167] Civil Rights Act of 1991, Pub.L. No. 102-166 Sect. 101, 105 Stat. 1071, codified at 42 U.S.C. Sect. 1981(b). *See Jones*, 541 U.S. at 383. *See also* Allen v. City of Chi., 828 F.Supp. 543 (N.D. Ill. 1993).

[168] Mohr v. Chi. Sch. Reform Bd. of Trustees of Bd. of Educ. of City of Chi., 993 F.Supp. 1155 (N.D.Ill.1998) (stating that § 1981 extended to enjoyment of all benefits, privileges, terms, and conditions of contractual relationship).

[169] Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989). *See* Smith v. Bray, 681 F.3d 888, 895 (7th Cir. 2012) (The Supreme Court in *Patterson* gave a narrow construction to the phrase "to make and enforce contracts" so that § 1981 did not apply to conduct after a contractual relationship had been established.).

[170] Williams v. Interstate Motor Freight Sys., 458 F.Supp. 20 (S.D. N.Y. 1978); *See also* Wallace v. Brewer, 315 F.Supp. 431, 455 (M.D. Ala.1970) (As citizens of

Seventh Circuit has found that when a defendant causes or participates in constitutional deprivation under § 1981, individual liability is appropriate.[171] Because this statute provides for equal rights of all citizens, individuals can be liable if they (1) intentionally cause a corporation to infringe on such rights; (2) authorize, direct or participate in the alleged discriminatory conduct; or (3) engage in discriminatory interference with plaintiff's contractual relationship with the employer.[172] This liability is not limited to supervisors but applies to fellow employees as well as corporate officers and directors.[173] Expanding on who may be liable, other district courts have found that individuals can be liable under § 1981 in a variety of roles, such as when the individual is an employee of a corporation,[174] a defendant in a civil rights case,[175]a store owner,[176]a supervisor,[177] or a federal

United States, plaintiffs had the right under this section relating to equal rights and property rights to make and enforce contracts and to own and hold property, and such rights were enforceable against private individuals without requirement of state action through both injunctive and monetary relief.); Mahone v. Waddle, 564 F.2d 1018, 1027 (3d Cir. 1977) (Right under this section "to make and enforce contracts" can be infringed by private individuals, and it is appropriate that private individuals be held liable for that infringement.); Solin v. State Univ. of N.Y., 416 F.Supp. 536, 539 (S.D. N.Y. 1976) (This section, unlike § 1983 of this title, does not require that plaintiff be aggrieved by "person" acting under color of state law.).

[171] Hildebrandt v. Ill. Dep't of Natural Res., 347 F.3d 1014, 1039 (7th Cir. 2003).

[172] Moffett v. Gene B. Glick Co., Inc., 604 F.Supp. 229, 235 (N.D.Ind. 1984), *overruled by* Reeder-Baker v. Lincoln Nat. Corp., 644 F. Supp. 983 (N.D. Ind. 1986).

[173] *Id*.

[174] *See* Coley v. M & M Mars, Inc., 461 F.Supp. 1073, 1076 (M.D. Ga. 1978) (Employees of a corporation could be held individually liable under § 1981, that guarantees an equal right to make and enforce contracts, for discriminatory interference with plaintiff's contractual relationship with the corporate employer, despite defendants' contention that there must be a contractual relationship or expectation between themselves and the plaintiff before they could be held liable under § 1981.).

[175] *See* Allen v. Denver Public Sch. Bd., 928 F.2d 978, 983 (10th Cir. 1991) *disapproved of by* Kendrick v. Penske Transp. Services, Inc., 220 F.3d 1220 (10th Cir. 2000) (A claim seeking personal liability in civil rights action under § 1981

official.[178] Therefore, recognizing individual "cat's paw" liability as applied to a human resources manager in a § 1981 suit is a natural extension of individual liability under the statute.

2. 42 U.S.C. § 1981's Similarity to 42 U.S.C. § 1983

Next, recognizing individual "cat's paw" liability under § 1981 is reasonable because § 1981 and § 1983 are governed by the same standards for intentional discrimination claims,[179] and other circuits have found individual liability for an unlawfully motivated supervisor under § 1983.[180] Section 1983 is implicated in a civil action where

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must be predicated on actor's personal involvement; there must be some affirmative link to causally connect the actor with the alleged discriminatory action.).

[176] *See* Jones v. Forrest City Grocery Inc., 564 F.Supp.2d 863 (E.D. Ark. 2008) (A plaintiff needed to show evidence that the owners of a grocery wholesaler personally discriminating against an African-American employee in order to hold them individually liable under §1981.).

[177] *See* Long v. Marubeni America Corp., 406 F.Supp.2d 285 (S.D.N.Y. 2005) (An executive employees' allegations that a supervisor participated directly in the discriminatory conduct against them and made various racist and sexist remarks were sufficient to state a discrimination claim against the supervisor under § 1981.). *See also* Amin v. Quad/Graphics, Inc., 929 F.Supp.73 (N.D.N.Y. 1996) (Individual supervisors may be found liable for damages under § 1981 and New York Human Rights Law if personally involved in the discriminatory conduct and the element of personal involvement may be satisfied by proof that the supervisor had knowledge of the alleged acts of discrimination and failed to remedy or prevent them.); Habben v. City of Fort Dodge, 472 F.Supp.2d 1142 (N.D. Iowa 2007) (Supervisory employees can be held individually liable on at least some kinds of race discrimination claims pursuant to § 1981.). *But see* Kaulia v. Cnty. of Maui, Dept. of Pub. Works & Waste Mgmt., 504 F.Supp.2d 969 (D. Haw. 2007) (Supervisors could not be held liable under § 1981 where they did not personally participate in the discriminatory acts which a Hawaiian county employee complained of when the supervisors were not aware of nor grossly indifferent to the immediate supervisor's alleged wrongdoing.).

[178] *See* Davis v. Reed, 462 F.Supp. 410 413 (W.D. Okla. 1977) (In order to be personally liable under this section relating to equal rights under the law for alleged acts of race discrimination in federal employment, individual federal officials must be directly and personally involved in a deprivation of equal employment rights.).

[179] Smith v. Bray, 681 F.3d 888, 899 (7th Cir. 2012).

[180] *Id*.

either a local government entity, or a state or local government employee sued in his or her official capacity deprives an individual of "any rights, privileges, or immunities secured by the Constitution and laws."[181] A cause of action under § 1983 is based on personal liability creates personal liability, and § 1983 holds an individual defendant liable if he or she caused or participated in constitutional deprivation.[182] Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position,"[183] and the Supreme Court has held that state officials sued in their individual capacities are "persons" under § 1983.[184] Thus, both § 1983 and §1981 seek to give parties a remedy against an individual when that individual deprived them of a constitutional right.

Additionally, multiple federal circuit courts have found that a "cat's paw" theory of liability would support imposing individual liability under § 1983 on government employees with unlawful motives who cause decision-makers to retaliate.[185] Even when a circuit has not decided this issue, lower courts (1) have chosen to refer to and agree with the circuits that have found in favor of "cat's paw" individual liability;[186] (2) have not yet addressed the issue;[187] or (3) have determined that individual liability exists.[188]

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[181] 42 U.S.C. § 1983 (1996).

[182] *Id*.

[183] Monroe v. Pape, 365 U.S. 167, 172 (1961), *overruled by* Monell v. Dep't of Soc. Services of City of N.Y., 436 U.S. 658 (1978).

[184] Hafer v. Melo, 502 U.S. 21, 23 (1991) (stating that the Eleventh Amendment does not bar such suits nor are state officers absolutely immune from personal liability under § 1983 solely because of the official nature of the acts).

[185] Smith v. Bray, 681 F.3d 888, 898-899 (7th Cir. 2012).

[186] *See* Schlier v. Rice, 630 F. Supp. 2d 458, 470 (M.D. Pa. 2007) (Until the Third Circuit decides the issue, guidance from other circuits provides that a subordinate with a retaliatory motive can be liable if that motive is a catalyst for events that lead to an adverse employment action that would not occur otherwise.).

[187] *See* Nagle v. Marron, 663 F.3d 100, 118 (2nd Cir. 2011) (The Second Circuit has neither accepted nor rejected the cat's paw approach so the court remands the case to the district court.). *See also* Reynolds v. Fed. Exp. Corp., 09-2692-STA-cgc, 2012 WL 1107834 (W.D. Tenn. Mar. 31, 2012) on reconsideration, 09-2692-

3. Fairness

In addition to individual liability being proper under § 1981 because of other courts' tendency to embrace "cat's paw" liability under § 1983, an inherent sense of fairness requires individual liability in cases where an individual has been wronged, the corporation is judgment-proof, and holding the individual liable comports with a structure approved by Congress.

The Seventh Circuit stated in *Smith* that holding a subordinate with a retaliatory motive liable as an individual under §1981 made sense "as a matter of basic fairness: why should the 'hapless cat' (or at least his employer) get burned but not the malicious 'monkey'?"[189] Fairness is a powerful motivator for courts to, at times, deviate from their proscribed courses, especially when one party is bankrupt. For example, in a corporate law case, a trustee in a bankruptcy proceeding sued a company owner's estate for violating the duty of care.[190] Typically, the trustee as a debt holder is not owed a fiduciary duty, but the court found that a duty of care was owed to the trustee in this case

STA-CGC, 2012 WL 2089952 (W.D. Tenn. June 8, 2012) (Since *Staub*, the Sixth Circuit has considered "cat's paw" twice, once under USERRA and once under FMLA, but never for individual liability under § 1983; moreover, in this case the court found it inappropriate to decide whether "cat's paw" liability extended to a co-worker.).

[188] *See* Starling v. Bd. of Cnty. Com'rs, 08-80008-CIV-HURLEY, 2009 WL 281051, at *6 (S.D. Fla. 2009), *aff'd*, Starling v. Bd. Of Cnty. Com'rs, 602 F.3d 1257 (11th Cir. 2010) (holding that "cat's paw" could be a basis for liability and that the supervisor's "role as instigator of the misconduct charges leading to [plaintiff's] demotion creates a potential premise for his individual liability under § 1983"). *See also* Rajaravivarma v. Bd. of Trustees for Conn. State U. Sys., 862 F. Supp. 2d 127, 167 (D. Conn. 2012) ("The Court applies, without holding, that the cat's paw theory of liability is applicable under Section 1981 discrimination claims brought pursuant to Section 1983.").

[189] Smith v. Bray, 681 F.3d 888, 899 (7th Cir. 2012). *See supra* text accompanying note 136.

[190] Francis v. United Jersey Bank, 432 A.2d 814, 816 (N.J. 1981) (Where "[t]he primary issue on this appeal is whether a corporate director is personally liable in negligence for the failure to prevent the misappropriation of trust funds by other directors who were also officers and shareholders of the corporation.").

because the company went into bankruptcy;[191] therefore, an individual, the corporate director, was held personally liable to the trustee.[192] As in *Francis*, the Seventh Circuit in *Smith* decided that a plaintiff acquires a right that he or she might not have under other circumstances[193] because the plaintiff deserves to be able to hold a party liable for the harm caused, despite a corporation's bankruptcy status.[194]

B. Impact of Seventh Circuit's "Cat's Paw" Rule

The Seventh Circuit's *Smith* decision extends the Supreme Court's *Staub* holding by applying "cat's paw" liability to an individual employee. Uncertainties exist, bringing hardship to both plaintiffs and defendants in bringing and defending § 1981 "cat's paw" claims. The lower courts have not offered clarification, thus far only acknowledging the extension's existence.[195] Further, the Seventh Circuit's extension of liability impacts corporations because they now have to train and advise their employees not only on how to avoid

[191] *Id*. at 817.

[192] *Id*.

[193] Smith v. Bray, 681 F.3d 888, 898-899 (7th Cir. 2012). *See supra* text accompanying notes 132-136.

[194] *See* Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995) (In this Title VII case, the plaintiff argued that where an employer is bankrupt or judgment-proof, the plaintiff's only means of recovery is individual liability. The court agreed that individual liability would not upset the Title VII structure established by Congress.). *But see* U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 n. 9 (7th Cir. 1995) (In this case involving the Americans with Disabilities Act of 1990, the plaintiff and Equal Employment Opportunity Commission argued that sometimes when an employer is bankrupt or judgment-proof, the only way a plaintiff can recover is individual liability. The court replied that although though true, being judgment-proof is not enough for the court to upset the structure Congress established.).

[195] Golden v. World Sec. Agency, Inc., 10 C 7673, 2012 WL 3151380, at *21 (N.D. Ill. 2012) ("In contrast to Title VII, an individual may be held liable under section 1981 if he caused or participated in the deprivation.").

imputing liability on the corporation through the "cat's paw" doctrine but also how to avoid liability themselves.

First, a plaintiff might be able to hold a co-worker, not just an employee in a supervisory position, individually liable under the "cat's paw" doctrine.[196] If the lower courts choose to interpret both Judge Posner's and Judge Hamilton's use of "subordinate"[197] to include co-workers, then the "cat's paw" doctrine vastly opens the door for plaintiffs to bring suits against a variety of individuals, not just those in a supervisory role or those with ultimate decision-making authority.[198]

Second, it has yet to be determined how the court will rule when a company is not judgment-proof. When employers and individuals are defendants in a lawsuit, if the plaintiff can seek judgment against the employer, the court could find that individual liability need not apply because another avenue exists to make the plaintiff whole. However, in dicta in *Smith*, the Seventh Circuit seemed to focus on retribution against the discriminatory individual, the "monkey," instead of concentrating on making the plaintiff whole.[199] This focus suggests that regardless of whether or not a corporation is judgment-proof, the court will still allow a plaintiff to bring a claim against an individual because it believes the employee who engaged in discriminatory behavior should be required to answer for that behavior. The Seventh Circuit believes in fairness.

Third, the Seventh Circuit's decision impacts how corporations train their employees, particularly their Human Resources Department ("HR") representatives. Corporations now must work harder to train their HR employees and then through HR, all other employees to ensure employees refrain from being influenced by those who harbor

[196] *See supra* text accompanying note 64 and Part II.B.2.

[197] *See supra* Part II.B.2.

[198] *See supra* text accompanying note 49.

[199] *See supra* text accompanying notes 136 and 189. *See also* Smith v. Bray, 681 F.3d 888, 899 n.5 (7th Cir. 2012) (The Seventh Circuit additionally mentioned the Eighth Circuit's position with regards to § 1983 individual liability: the Eighth Circuit holds only biased subordinates, not innocent or duped decision-makers, individually liable.).

bias. Post *Smith*, an HR manager is personally liable if there is evidence that he or she harbored and acted on an improper motive, causing a company decision-maker to take an adverse employment action against another employee.[200] Companies must examine the path that an adverse decision takes amongst employees to ensure that bias is not at the root of an adverse employment decision; further, employees must also delve into the details before bringing an adverse employment action against an employee to ensure the decision is not tainted.[201] An additional reason for companies to ensure diligence in training employees is that a tainted decision can follow an employee for a portion of that employee's career. If an employee moves to a different company, he or she is not automatically immune from "cat's paw" litigation stemming from his or her previous employment. Because §1981 claims have a long statute of limitations,[202] an HR employee can still be liable for dismissing an employee years ago at a previous company.[203] Therefore, training to prevent this type of liability will become a top priority for companies.

C. Criticism of the Smith decision

A criticism of the Seventh Circuit's decision is that the court improperly expanded "cat's paw" liability because it did so on a shaky foundation: the *Staub* decision.[204] The Seventh Circuit relied on

[200] FordHarrison LLP, *HR Manager May Be Personally Liable Under Section 1981*, 22 No. 12 Ill. Emp. L. Letter 1 (July 2012).

[201] *See* 18 No. 14 Quinlan, HR Compliance Law Bulletin NL 6 (July 15, 2012) (*Smith* opens the door for other employees to file suit against individual Human Resources managers and other employees who allegedly have played a role in the decision-making process.).

[202] *See supra* text accompanying note 166.

[203] Melissa Maleske, *Court applies cat's paw theory in race-based retaliatory claims: 7th Circuit rules employees can be held individually liable for causing their employers to retailiate against other employees*, INSIDECOUNSEL MAGAZINE (July 31, 2012), http://www.insidecounsel.com/2012/07/31/court-applies-cats-paw-theory-in-race-based-retali?page=2.

[204] Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011).

Staub's "cat's paw" liability test, but one can argue that this test did little to appease employers and employees alike seeking clarity in defending and bringing "cat's paw" litigation.[205]

The Supreme Court's test is arguably problematic on multiple levels. First, the Court did not clarify a standard for causation,[206] but instead relied on the already-unclear[207] proximate cause standard.[208] Because of this lack of clarity, lower courts have over-relied on analogizing the *Staub* facts with the facts in the cases before them, forcing plaintiffs to provide strong circumstantial evidence of discrimination to avoid dismissal on the grounds of not fitting into the narrow *Staub* circumstances.[209]

The Seventh Circuit applied this arguably unclear holding, meant for corporate entities, to individuals without reserve. As seen in *Smith*, even if a plaintiff can overcome *Staub*'s high hurdles of intent and proximate cause, the plaintiff can still fail on other causation standards.[210] Applying the proximate cause standard to determine whether an individual is liable on top of other discrimination statutes' causation standards only confuses plaintiffs, employees and employers because they are unsure of who is and is not liable under the doctrine. Multiple layers of causation within one case promises to lead to inconsistent application among the circuit courts.

Next, the Supreme Court relied on basic tort and agency principles to create its new test, instead of clarifying a test from the various lower court decisions[211] or looking to the statutory text.[212] The

[205] *See* Covel, *supra* note 3, at 160.

[206] *Id*. at 182.

[207] *Id*. at 183. (stating that "the Court failed to clarify what constitutes sufficient evidence to establish a direct relation in a situation that by its very nature requires more than two parties").

[208] *Staub*, 131 S. Ct. at 1192.

[209] *See* Covel, *supra* note 3, at 183.

[210] Smith v. Bray, 681 F.3d 888, 899-901 (7th Cir. 2012).

[211] *See id*. at 182.

[212] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1995 (2011) ((Alito, J. concurring) (Justice Alito thought the majority's description of what a plaintiff must show in relation to the motivating factor was contrary to the statute's language.).

Court thus chose a route with greater potential for different interpretations rather than one of two less ambiguous paths. Moreover, even though the Court used agency law to define its test, it left open the possibility that "cat's paw" liability could apply absent an agency relationship.[213] Holding an employee, and possibly a co-worker, liable in his or her individual capacity falls away from the agency relationship and thus could continue to create confusion as to exactly when liability attaches to an employee.

Finally, the Court's assertion that an employer still has a defense absent a hard-line investigation rule may prove to be employers' get-out-of-jail-free card. *Smith* demonstrated this defense, not under the "cat's paw" inquiry, but rather under the § 1981 inquiry.[214] The Court found that if a plaintiff cannot show a "'substantial or motivating factor'" in the subordinate's decision to recommend that the decision-maker terminate the employee, the retaliation claim fails.[215] Thus, it appears that at least in § 1981 retaliation claims, despite the Supreme Court refusing to determine a bright-line rule regarding investigations, a subordinate escapes "cat's paw" liability if it finds another reason outside of retaliation to recommend and cause an employee's termination.[216]

Thus, the *Staub* opinion and the *Smith* court's application of that opinion to individual liability leave many important elements open for interpretation. The Seventh Circuit should have either (1) resolved these areas before moving into uncharted territory and declaring individual liability proper under the "cat's paw" doctrine; or (2) created new specifications for when a plaintiff sues an employee in his or her individual capacity under "cat's paw." However, when the

[213] *See* Covel, *supra* note 3, at 182. *See* Staub, 131 S.Ct. at 1196 (Alito, J. concurring) (Justice Alito notes that departing from traditional agency principles by leaving open the possibility that a co-worker's actions could impose liability on an employer will create confusion around the "cat's paw" theory.).

[214] Smith v. Bray, 681 F.3d 888, 900 (7th Cir. 2012).

[215] *Id*. (quoting Culver v. Gorman & Co., 416 F.3d 540, 545 (7th Cir. 2005)).

[216] *See* Covel, *supra* note 3, at 186 (The Court chose not to adopt a bright-line independent investigation rule to indemnify employers, but an employer can still assert an "unrelated reason" for the adverse employment action as a defense.).

Seventh Circuit employed the proximate cause standard in *Smith*, it simply determined that proximate cause existed;[217] this clean, quick finding of proximate cause could signal that the court wants an uncomplicated analysis from lower courts in the future.[218]

CONCLUSION

To conclude, the Seventh Circuit correctly ruled that an employee harboring a discriminatory animus is individually liable when he or she intends his or her conduct to be, and whose conduct is, the proximate cause of an adverse employment action against another employee. The rule conforms with the history of § 1981, follows reasonably from the rationale for holding individuals liable under the "cat's paw" doctrine in § 1983 cases, and flows from an inherent sense of fairness. Thus, the monkey is no longer immune from the dire consequences of his behavior; he is finally held responsible for his actions.

[217] Smith v. Bray, 681 F.3d 888, 900 (7th Cir. 2012).

[218] A simpler proximate cause analysis prevents courts from feeling the compulsion to narrowly conform a case's facts to those in *Staub* in order to find "cat's paw" liability. *See supra* text accompanying note 209.